No. 3515

In the United States
Circuit Court of Appeals
For the Ninth Circuit

MARTIN TROGLIA,
Plaintiff in Error,
vs.
THE BUTTE SUPERIOR MINING COMPANY, a Corporation,
Defendant in Error.

IN ERROR TO
THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

Brief of Plaintiff in Error

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STATEMENT OF THE CASE

The above entitled action was commenced in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow. The defendant in error, an Arizona corporation, filed its appearance and by stipulation of the parties the cause was removed to the District Court of the United States for the District of Montana.

Plaintiff brought this action against the defendant corporation for damages for the death of his minor son, on or about the 13th day of June, 1918, which he alleges was approximately caused by wrongful and negligent acts of the defendant substantially as follows:

That on and prior to the day when plaintiff's son met his death the defendant kept and maintained in Silver Bow County, Montana, an artificial dam or reservoir to supply its mill with water, it being engaged at the time in a general mining and milling business. The dam was about 100 feet long, 75 feet wide, and varied in depth from one to twelve feet, and was filled with water. This dam was not enclosed with fence or other barrier, but then was, and prior thereto had been, wholly unenclosed and open to the public generally, and defendant carelessly and negligently suffered and permitted the artificial dam and reservoir to be and remain open and exposed, with no watchman or person to warn minor children against trespassing at or near the same. That it

was contiguous to a public highway, about 25 feet therefrom, and many children passed to and fro, including the minor son of plaintiff and his youthful companions and playmates.

That the dam and reservoir became and was an enticing and alluring attraction to children generally as a swimming hole and bathing pond, and many children of the neighborhood, including plaintiff's minor son, did at divers times prior to the 13th day of June, 1918, go swimming or bathing at and in the same, all of which was well known to the defendant, or by the exercise of ordinary care would have been known to it. It is then alleged that the dam or reservoir is fed from the waters of a creek or channel whose source of suply is found in the melting snows of the highlands nearby, and during the month of June of each year the waters therein contained are cold, chilly and of low temperature, that is to say of a temperature of 40 or 50 degrees Fahrenheit, this being known to the defendant.

It is then alleged that the defendant knew, or by exercise of ordinary care would have known, that the dam and reservoir adverted to and kept and maintained by it, was a dangerous instrumentality peculiarly attractive to children of tender years, among them plaintiff's minor son, for the purpose of making use of the same for bathing and swimming purposes; yet notwithstanding the premises, the defendant failed and neglected to use ordinary care

or any care at all to prevent children, and particularly the minor son of plaintiff, from making use of the same for swimming and bathing purposes, but carelesly and negligently suffered and permitted children, among them plaintiff's minor son, to so make use of the same.

Further, that on the said day the defendant knew, or could have known by the exercise of ordinary care, that plaintiff's minor son and his playmates and companions were lawfully on the premises of said defendant at said dam or reservoir, by and through an invitation implied by law, for that plaintiff's minor son, and his playmates and companions were on said day lured thereto by the peculiar and tempting attractivness of the same as a swimming pool or bathing pond. It became and was the legal duty of the defendant to warn plaintiff's minor son and his playmates and companions of the dangers attendant on going in swimming in the deep and cold waters of said dam or reservoir and to forbid its use for such purposes and to order plaintiff's minor son and his playmates and companions from the same and from the premises of the defendant, but the defendant carelessly and negligently suffered and permitted plaintiff's minor son and his playmates and companions to go in swimming in the deep and cold waters of the same, and while plaintiff's minor son was so suffered and permitted to bathe in the same, by and through the implied invitation ofthe defend-

ant, and by its careless and negligent acts, the body of plaintiff's minor son sank therein, and he was drowned and he died therein.

The proximate cause of the death is alleged to have been due to the careless and negligent acts of the defendant in suffering and permitting and in failing to prevent minor children to swim and bathe in the dam and reservoir, particularly the minor son of plaintiff, and in suffering and permitting the same to be and remain upon its premises in an open, exposed and unguarded condition, while in the exercise of ordinary care it would have known that it was a dangerous instrumentality peculiarly attractive and alluring to minor children, and that by the implied invitation of the defendant it did entice and allure children, and particularly the minor son of plaintiff, to his death on said day, and whose death could have been prevented by the use and exercise of ordinary care by the defendant.

General and special damages are prayed for. (Tr. 5-10).

A general demurrer was interposed which was, after argument and consideration by the Court, overruled upon the authority of Union Pacific Ry. Co. vs. McDonald, 152 U. S. 262, and Fusselman vs. Yellowstone Valley Co., 53 Mont. 254. (Tr. 11).

The answer of the defendant put in issue the allegations of the complaint, and alleged some affirmative matters which were met by reply, not necessary

to be considered here.

On the 21st day of November, 1919, a trial was had by the Court sitting with a jury.

In support of the allegations of the complaint, plaintiff's proofs disclose that defendant's artificial dam and reservoir was of the size and depth substantially as alleged in the complaint on the 13th day of June, 1918 when plaintiff's minor son came to his death therein by drowning. It appears that in 1917 a smaller and shallower dam existed there and that it was enlarged and deepened sometime between the two seasons (Tr. 40-78-85-86-90). The witness Joseph Bertoglio testified the dam was distant from a public road about ten or fifteen yards (Tr. 35). The witness Antone Donetti testified that he saw grocery wagons going upon the road and an automobile and that there were six or seven houses in the immediate vicinity (Tr. 50). The witness Hugo Giachetti testified that the road was twenty-five to thirty feet from the western or northern border of the pond; it led to some mining properties beyond the pond (Tr.60-61) to the same effect as the testimony of Thomas Ciabattari (Tr. 71-72). There was no enclosure around the pond (Tr. 34-48-60-71-79). Four or five signs bearing the words "No Trespassing" "Private Property" and "Danger, ten feet deep, keep out" were posted about the reservoir (Tr. 37-53-54-62-73). The witness Joseph Bertoglio testified that the boys who went swimming there paid no attention

to these signs (Tr. 42) to the same effect is the testimony of Thomas Ciabattari (Tr. 73-74) and Joseph Darin (Tr.83) and witness Joseph Bertoglio testified that a pump-room was located about fifteen or twenty yards from the dam in charge of an employee of the defendant but the pump-man never protested against boys swimming in the dam while the witness was there. When asked whether the watchman consented to the boys going in swimming this witness answered that the pumpman never said anything against it (Tr. 32). They were not forbidden to swim in the pond (Tr. 36). On the day of the drowning, the pumpman was there (Tr. 48-49-52). Hugo Giachetti testified that when the boys went in swimming they used to go into the pumproom on Sundays to look at the funny papers; at such times the watchman or pumpman would be attending to his duties and the boys would go in there naked and the pumpman never made protest of any kind (Tr. 57-59-67). The witness Hugo Giachetti testified that the watchman or pumpman saw the boys in swimming there many times but never made protest (Tr. 77) and was in the pump-room many times in 1918 prior to the 13th of June (Tr. 69) further, that the boys making use of the pond for swimming purposes would enter the pump-room with their bodies wet and naked, the pumpman would see them going in and would greet them by saying "hello"(Tr.80-81). The witness Nicholas Fabatz testified that the boys

played games in the water and nobody interfered to prevent them from going in the water though the pump-room was twenty-five feet away in charge of a pumpman (Tr. 90). About an hour before the drowning, the pumpman was there watching the boys swim; at that time there were four or five boys in the pond but the watchman made no protest (Tr. 91-92). On the day of the drowning, as many as eleven or twelve or fourteen boys were in swimming at the pond (Tr. 31-51-68-70-81). The drowning occured late in the afternoon; the drowned boy had been there two or three hours (Tr. 54-92). Preceding the drowning, the deceased entered the shallow water about twenty-five feet from the pump house and swam out into the deep water where the drowning occured (Tr. 93). The boy called for help (Tr. 31). The witness Nicholas Fabatz standing nearby thought the boy was only playing in the water when the call for help came (Tr. 95). At the time of the drowning another boy was also apparently drowning but was rescued, (Tr. 94). Both during 1917 and 1918 prior to the drowning, this pond had been made use of by many boys for swimming purposes without protest, and with the knowledge and acquiescence of defendant's watchman or pumpman (Tr. 32-36-49-56-69-74-76-77-88). It was conceded the pump-room was maintained by defendant (Tr. 57). At the time of the drowning, deceased was about four feet six inches tall (Tr. 51) eleven years of age (Tr. 28)

a fairly good swimmer (Tr. 38) and had just passed from the sixth to the seventh grade of the common schools (Tr. 43) and was a bright boy for his age (Tr. 44) but was at the reservoir without the knowledge or consent of his parents (Tr. 28-29). Proof of damage was received by the Court (Tr. 100-109).

At the conclusion of plaintiff's case, defendant moved the court to direct the jury to return a verdict for the defendant (Tr. 113-116); this motion was granted by the Court and the jury was instructed to return a verdict in favor of the defendant (Tr. 116-120). Judgment was duly entered upon the verdict (Tr. 124) and the usual proceedings had to bring the matter before this Court on writ of error Tr. 125-138). During the course of the Court's charge, the Court again reiterated its view that the complaint was sufficient to charge the defendant with negligence making use of the following language:

"Briefly, in order that it may appear in the record, the court is satisfied that, as against a general demurrer the complaint states a good cause of action for the negligence of the defendant. It charges that the boy who was drowned was eleven years old; that the defendant built an artificial dam, a hundred by seventy-five feet, one to twelve feet deep, not enclosed, and no watchman, within twenty-five feet of a highway over which this boy and many other people were habited to pass; that the water was fifty degrees cold; that the defendant knew that this place

would allure children to swim; that it was its duty to warn them of the danger; that they negligently suffered the boy and others to go swimming and bathing in the cold water, and while the boy who was drowned was bathing, he sank and drowned. The general demurrer only challenged the general sufficiency, not in detail."

The reasons prompting the court to direct a verdict for the defendant appear in the charge (Tr.116-120) and more specifically in the assignment of errors (Tr. 127-132) which appear on the following pages of this brief.

ASSIGNMENT OF ERRORS

1.

The court erred in granting a motion to return a verdict in favor of the defendant in this cause for the reason that the evidence conclusively shows that the plaintiff's deceased minor son was an infant, eleven years of age, at the time he was drowned in the artificial dam and reservoir, maintained by the defendant, and non sui juris, and was upon the premises of the defendant and swimming in said pond upon the invitation of the defendant and the question of his contributory negligence was, and is a question of fact to be resolved by the jury and not a question of law, to be determined by the court.

2.

The said court erred in charging the jury as fol-

lows:

"If in the judgment of the court, as a question of law, the evidence is not sufficient to sustain a verdict for the plaintiff, if the jury should find one, then it is the duty of the court to direct a verdict in favor of the defendant, and in this case the court will do so, its judgment being that the evidence would not sustain a verdict for the plaintiff." Because the quesiton of the negligence of the defendant and the contributory negligence of the plaintiff's deceased minor son were and are questions of fact to be resolved by the jury, and not questions of law, to be determined by the court.

3.

The said court erred in charging the jury as follows:

"Here we find a boy—in the first place we find that it was not near a road that was habitually travelled by this boy and other boys, though that is not material in any phase of the case. After all the location of the pond only goes to what the defendant ought to anticipate and its knowledge, and that might have been well proved by other evidence in the case, as to what the defendant should have anticipated and its knowledge." Because the evidence conclusively shows that there was a public highway within twenty-five feet from the north edge of said artificial pond and that it, and the contiguous territory was habitually traveled by boys of tender age who

were allured to said pond by its attractive characteristics for swimming and bathing purposes.

4.

The said court erred in charging the jury as follows:

Here was a boy eleven years old. He was a strong boy for his age, somewhat athletic and a good swimmer, and a boy who was well able to read, and we find a number of signs there—none of these things appear in the complaint—we find also that the company had exercised some reasonable degree of care to warn people of the danger, and boys; that they placed a sign: "Danger, ten feet deep, keep off." "No trespassing," and the like, which this boy could read, or any other boy of his age." Because the evidence shows without contradiction, that defendant had a watchman in charge of a pump station located within tewnty-five feet of said pond, who suffered and permitted children of tender years, including plaintiff's minor son to go swimming and bathing therein, without protest, but with acquiescence and consent of the defendant, whereby the signs adverted to were wholly disregarded by said children.

5.

The said court erred in charging the jury as follows:

"Now, it appears from the evidence that the season before this accident happened—because the Court will finally say in this case that nobody was guilty of

any negligence, neither the company nor the boy—it was an accident pure and simple; the boy was conducting himself properly under the circumstances, being a strong boy and a boy well able to swim, and the fact is after all, when he did drown, it was because he had stayed around there, in and out of the water, so long that he was either exhausted, or what is more probable, he was seized by cramps and sank, because the two boys that saw him when he drowned say he had been there about two hours and before they had been there, and all that time in and out of the water; that he was swimming well before and at the time that he went down; that he swam from the low water out and over the deep water, and suddenly threw up his hands and hollered and sank. I think there can be only one inference, that he was seized with cramps." Because the question as to whether the drowning was an accident or was due to defendant's negligence was, and is, a question of fact to be resolved by the jury and not one of law, to be determined by the court.

6.

The said court erred in charging the jury as follows:

"A grown man who comes upon your premises, your duty is not so great towards him. A boy of twelve or fifteen or sixteen, your duty would be a little more than for a man, but not so great as it would be for children of three or four or five or six

if you invite them upon your premises expressly or impliedly."

7.

The said court erred in charging the jury as follows:

"For instance, if a man set up ladders outside of his house, and if he knew one's children are accustomed to climb up and play on his roof, if he lets little children not capable of caring for themselves, go up there, three or four or five or six years old, I imagine he still might be held liable, where he would not be for a child twelve or thirteen or fourteen or fifteen. Other circumstances might be imagined."

8.

The court erred in charging the jury as follows:

"But to get right back to this case, here is a boy against whom the defendant, as the court sees it, neglected no detail. They had a pond there; every one has a right to have such things on their premises if they are useful, within the bounds of the statute. This boy was strong, he was able to swim, and apparently to swim for a long time. Defendant had no reason to anticipate that he was not able to care for himself; defendant had no reason to furnish him a guard nor a fence nor anything else." Because the question as to whether said boy was sui juris, was a question of fact to be determined by the jury, and not a question of law, to be determined by the court.

9.

The said court erred in charging the jury as follows:

"He was not negligent in going there, because you might then say that of any person if they go in bathing, that they are negligent, but they are not, if they are able to swim; they are able to take care of themselves. If misfortune comes to them, and anything happens, chance or anything else, or if they stay in till they are exhausted and they sink in deep water, it is an accident and nothing else, and the Court places its decision in this case on that basis." Because questions of accident and negligence as disclosed by the evidence in this case, were and are questions of fact to be decided by the jury and not by the court.

The court erred in directing the jury to return a verdict in favor of the defendant as follows:

"The defendant was not negligent, consequently not negligent as far as this boy is concerned. Consequently the Court will instruct the jury to return a verdict in favor of the defendant."

ARGUMENT

The theory upon which this action is brought is that under the facts stated, defendant is liable in damages to the plainiff for the deah of his minor child by drowning in the artificial pond or reservoir of the defendant in Silver Bow County, Montana, on

the 13th day of June, 1918, upon the turn-table or attractive nuisance doctrine.

As pointed out in the statement of facts, the court held the complaint to state facts sufficient to charge the defendant with actionable negligence, supporing its ruling by citing the cases of Union Pacific Ry. Co. vs. McDonald, 152 U. S. 262, and Fusselman vs. Yellowstone Valley Co., 53 Mont. 254. The Fusselman case is authority for the proposition that the attractive nuisance or turntable doctrine is recognized as being the law in the jurisdiction of Montana and that the doctrine extends to cases of this kind; the trial court, however, after holding the complaint as sufficient against atack by general demurrer, at the close of the trial ruled the plaintiff's proofs were not sufficient to justify recovery against the defendant. It is our contention that plaintiff proved by good, competent and sufficient evidence, every material allegation of the complaint and that the court committed reversible error in directing the jury to return a verdict against the plaintiff.

That the defendant maintained an attractive nuisance upon its premises as alleged in the complaint is substantiated by ample proof; that children of tender years were lured thereto for the purpose of using the same as a swimming hole cannot be gainsaid, and that the maintenance of the pond by the defendant as disclosed by the proof was a dangerous instrumentality is manifest from the fact that not only

was plaintiff's minor son drowned on the day alleged but that another youngster with him was rescued from drowning. Its presence there in its unguarded condition and with defendant's watchman and pumpman present, tolerant and acpuiescent, was the very attraction which lured deceased to his death. It is true a number of signs or placards were posted at or near the pond warning against danger and that this fact is not alleged in the complaint but on the other hand the proof stands wholly without contradiction that the defendant kept and maintained a pump station within a few feet of the edge of the pond and a very short distance from the pond where the fatal drowning occured, and that this station was in charge of a watchman or pumpman in the employ of the defendant. This servant of the defendant not only did not warn the children of any dangers attendant upon going in swimming in the cold waters of the reservoir, but actually encouraged them to do so by permitting them to make use of the pump station for warming their bodies when chilled and drying and robing themselves therein and to use the place generally for the purposes of youthful pastimes and diversions. This watchman knew of the presence of the deceased at the pond on the day in question for the boy had been in and out of the water a number of times covering a period of two or two and one-half hours and about or within an hour before the fatal drowning occured, the pumpman stood

there watching the boys swim; small wonder then that no attention was paid by the boys to the warnings appearingupon the signs and placards adverted to. The nature and instinct, the youthful passions and proclivities common in the majority of boys, especially healthy ones, often impels them for the sake of indulging in pleasurable pastimes to become wholly oblivious and unconscious of impending dangers which those of maturer years are chargeable with knowing as a matter of law.

We respectfully urge that the trial court erred in holding deceased to be sui juris as a matter of law. The general doctrine is, that the question of the negligence or contributory negligence of a child presents one of fact for the jury to pass upon and not one of law for the court to decide. In Kansas Central Railway Company vs. Fitzsimmons 21 Kansas 286, 31 American Reports 203, it was held that where a boy twelve years of age was injured while playing on a turntable left unlocked and unguarded in an open prairie where persons frequently passed, the question as to whether the child was sui juris was properly left to the jury to decide An extensive note accompanies the reported case in 31 American Reports, 203, to which atention is respectfully invited. In the jurisdiction of Montana in the case of Mason vs. N. P. Ry. Co. 45 Mont. 474, the plaintiff, a young lady sixteen years of age whilst driving along the public highway with her fifteen year old brother was in-

jured by colliding with a railroad train at a crossing. The court in passing upon an instruction given by the trial court, used the following language:

'"The court gave the following instruction to the jury: "You are instructed that a child is bound to exercise only the care of (1) those of his own age and understanding, and if you find that the plaintiff and her brother, who was driving the carriage in which she was riding, were children at the time of the alleged injury, and that they exercised such care as a reasonable person of their respective ages would exercise under the circumstances of this case, then neither of them was guilty of contributory negligence which would defeat plaintiff's right to recover in this action." We think this instruction correctly stated the law. White's Supplement to Thompson on Negligence, section 309, thus states the rule: "The measure of responsibility of a person of immature years for contributory negligence is regarded as the average capacity of others of the same age, intelligence and experience, and this is to be considered with reference to the character of the danger to which he is exposed."

"In view of the immaturity of the plaintiff, we cannot say, considering the precautions which were actually taken to discover whether or not a train was approaching, and all the other facts and circumstances of the case, that she was guilty of contributory negligence as a matter of law, and we think the learned district judge erred in so holding. Whether or not she was guilty of contributory negligence was a question of fact to be determined by the jury; they decided the question in the negative, and that decision should stand so far as that feature of the appeal is concerned."

See also the following authorities: Brown vs.

Salt Lake City (1908) 33 Utah 222, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828, 93 Pac. 540, 14 Ann. Cas. 1004. Price v. Atchison Water Co. (1897) 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450, 3 Am. Neg. Rep. 392. Indianapolis v. Williams (1915) 58 Ind. App. 447, 108 N. E. 387. Kansas City v. Siese (1905) 71 Kan. 283, 80 Pac 626. Omaha v. Richards (1896) 49 Neb. 224, 68 N. W. 528. Union Pacific Railway Company v. David George McDonald 152 U. S. 262, 38 L. Ed. 434. Sioux City & P. R. Co. v. Stout, 17 Wall. (84 U. S.) 657, 21 L. Ed. 745.

Conway v. Monida Trust Co. (1918) 47 Mont. 269.

The foregoing discussion presupposes the attractive nuisance or turntable doctrine has found recognition in the jurisdiction of Montana. In 1908 the Supreme Court, in the case of Gates vs. Northern Pacific Railway Company, 37 Mont. 103-116, had the following to say:

"It is my judgment that when the owner or occupier of grounds brings or artificially creates something thereon especially attractive to children, as shown by the nature of the thing itself and the fact that a child was, or children were, attracted to it, and leaves it so exposed that they are likely to come in contact with it, either as a plaything or an object of curiosity, and where their coming in contact with it or playing about it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to use ordinary care to guard it so as to prevent injury to them."

The Stout case, 84 U. S. 657, recognized as the leading "turntable" case, has been recognized by the Supreme Court of the State of Montana in the case of Fussleman vs. Yellowstone Valley Co., 53 Mont. 254, an action for damages for the drowning of a child in an irrigation canal; recovery, however, being denied because neither pleadings nor the proofs were sufficient to charge the defendant with liability. The case of Union Pacific Railway Co. v. McDonald 152 U. S. 262, relied upon by the trial court as authority for overruling defendant's demurrer to plaintiff's complaint extends the turntable doctrine to cases involving other dangerous instrumentalities. There can be no question therefore, but that the attractive nuisance and turntable doctrines constitute the rules of decision in the Montana jurisdiction.

Was the learned trial judge under these circumstances justified in holding the defendant company free from negligence as a matter of law? We contend not. A case very much in point it that of Price vs. Atchison Water Company 58 Kan. 551, 62 Am. St. Rep. 625. In that case, plaintiff's minor son, eleven years of age was drowned while playing at one of defendant's reservoirs, the reservoir in question was enclosed with a barb wire fence, ten to twelve wires high; there were two gates through the fence which were kept closed and two contrivances for stiles or sheds nailed to the adjacent trees and enclosing the fence wires and upon and over which boys climbed

from the outside to get access to the reservoir; defendant had employed a watchman custodian at the grounds who was aware of the habits of the boys of the town to climb over the stiles or sheds and permitted them to do so without objection. Plaintiff's deceased son went with some companions to the reservoir in question to fish and play and was drowned. A demurrer to the evidence for insufficiency to prove a cause of action was sustained. Upon review by the higher court two questions were raised, and disposed of as follows:

"The contention arising upon the above state of facts divides itself into two principal questions: 1. Was the defendant in error negligent, as to the deceased boy, in maintaining the dangerous reservoir: and 2. Was the deceased guilty of contributory negligence in venturing upon the slanting walls and projecting apron? These are questions of fact, and they should have been left to the jury for determination. They are not questions of law for decision by the court."

In the course of the opinion, the court had the following to say:

"Counsel for defendant in error endeavors to distinguish the "turntable" and other like cases from the one under discussion, upon the ground that, in such first-mentioned cases, the dangerous instruments or places were not inclosed, so as to exclude or warn trespassers, while, in the present case, the reservoirs had been so fenced as to render access to them difficult to say the least, and in any event to operate as notice to stay on the outside because of the dangerous situation within. Whatever merit such

precautionary measures might have under other circumstances, it is sufficient to say that in this case, they were not reasonably effective; because it was the daily habit of trespassing boys to mount the fence and frequent the reservoirs on the inside, and this habit was known to the company's responsible agent, and was not only tolerated but went unrebuked by him. Knowing the fence to be ineffective either as barrier or warning, it was the duty of the company to expel the intruders, or adopt other measures to avoid accident. Whatever advantage the defendant in error might have gained from the erection of a reasonably effective barrier or warning is neutralized by the facts of its knowledge that the boys did trespass, and its permission to them to do so. It is as though no fence at all had been erected."

Paraphrasing the latter portion of the foregoing excerpt, we may, we believe, say with entire propriety that whatever advantage the defendant in error might have gained from the erection of the signs at the reservoir where plaintiff's minor son was drowned was neutralized by the facts within defendant's knowledg that many boys of tender years did repeateldy make use of the said reservoir as a swimming hole, at no time rebuked by defendant's watchman but by him tolerated, humored, encouraged and entertained in the pump station of which he had charge, situated on the edge of the dam. It thus became indeed and was in fact an alluring attraction to the neighboring youngsters.

The very fact that defendant had erected signs and placards at or near the pond with such words

imprinted thereon as "Danger," "Danger, ten feet deep, keep out" is ample proof of defendant's actual knowledge of the dangerous character of the pond as a swimming hole. The words "Ten feet deep, keep out" of themselves were sufficient to charge the defendant with knowledge, yes with an open admission that the pond was a dangerous instrumentality, particularly alluring to minor children for swimming and bathing purposes, else why did it cause signs bearing them to be erected there?

Prior to June 13th and after the enlargement of the dam, it had already been made use of by children for bathing purposes for at least two weeks, and on the day of the drowning as many as twelve or possibly fourteen young boys were there for that purpose; the public schools had closed that day and the drowned boy had just succeeded in passing from the sixth to the seventh grade in the common schools; the occasion made this particular day therefore, a grand holiday for the boys. True the Troglio boy could swim and had he been possessed of the discretion common in men of mature years, the drowning in all probability would not have occured. The court in its charge to the jury after hearing the facts attributed his death to exhaustion or cramps:

"It was an accident pure and simple; the boy was conducting himself properly under the circumstances, being a strong boy well able to swim, and the fact is after all when he did drown, it was because he had stayed around there, in and out of the water,

so long that he was either exhausted, or what is more probable he was seized by cramps and sank, because the two boys that saw him when he drowned say he had been there about two hours and before they had been there, and all that time in and out of the water; (Tr. 118).

If we are to accept the court's conclusion in this respect, then it is manifest that between the time he first entered the water and the time of the drowning pathological changes occured in his body, due to its temperature being lowered from normal, by reason of its repeated immersion and exertion in the water of the dam, resulting in exhaustion or cramps, and we respectfully submit that a boy of his years could not be charged, as a matter of law with knowledge of the consequences which might ensue from the repeated immersion and exertion of his body in waters concededly of a lower temperature than that of a human body. Had the drowned boy been younger, the court would have permitted the case to go to the jury, for in the charge we find this language:

"I still think that if it had appeared in evidence that little children of three or four or five years of age were coming around this pond, if such a case had been made here, it would have been within the turntable doctrine. This is nothing more than a phase of the general law; it is part of the general law; it comes right back to the proposition that premises must be kept reasonably safe to those who are impliedly invited there."

It would appear from the foregoing excerpts, that it was the court's conclusion that defendant in this

case had discharged its duty towards plaintiff's intestate because the boy was eleven years old, strong, athletic and could swim, but that under precisely and exactly similar circumstances the case of negligence would have been made against the defendant had deceased been four or five years of age. Was the court justified in so holding? Had the defendant exercised ordinary or any degree of care to preserve the life of this youngster, and of his associates and companions, may we not here with entire confidence say that one word of protest from the watchman and pumpman in charge would most surely have prevented the fatal consequences suffered by this boy; indeed, we think we may go further and declare with equal confidence that the defendant was guilty of gross negligence in failing to require its servant in charge to do so. In any event, we earnestly maintain the situation presents an undisputed statement of facts from which different inferences might be drawn and therefore, resolveable by a jury and not by a court (See cases cited supra and Volume 8 Rose's notes page 176). The Supreme Court of Montana, in Conway v. Monida Trust Company 47 Mont. 269, made use of the following language:

"At what age a child becomes sui juris, so that negligence may be predicated of his acts, is a matter upon which authorities differ. By some it is held that a child of seven years of age is conclusively presumed incapable of contributory negligence. (Watson v. Southern Ry., 66 S. C. 47, 44 S. E. 375; Taylor

v. Delaware & Hudson Ry., 113 Pa. 162, 57 Am. Rep. 446, 8 Atl. 43; Chicago etc. Ry. Co. v. Welsh, 118 Ill. 572, 9 N. E. 197; Indianapolis etc. Ry. v. Pitzer, 109 Ind. 179, 194, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70) However that may be, the rule in this state is that contributory negligence is not to be inferred as a matter of law, even in the case of a much older child. (Mason v. Northern Pac. Ry. Co., 45 Mont. 474, 124 Pac. 271.)"

In the recent case of Sherris v. Northern Pacific Ry. Co. Decided in 1918, 55 Mont. 189, the Supreme Court of Montana, laid down the following rule:

"The general rule is that after a child has reached the age of fourteen years he is presumed, as a matter of law, to be capable of contributory negligence. (White's Supp. to Thompson on Neg., sec. 315; 20 R. C. L., p. 128.)

In the case of the City of Pekin vs. McMahon, (Ill. 27, L. R. A. 206) the Supreme Court of Illinois in 1895 reached the conclusion that liability attached to the defendant under facts similar and analogous to those in the case at bar and applying the turntable doctrine, made use of the folowing:

"The love of motion, which attracts a child to play upon a revolving turntable, will also attract him to experiment with a floating plank or log which he finds in a pond within his easy reach. The doctrine of the turntable cases is sustained by other cases where the injuries complained of were caused by agencies of a different character. Such are Mackey v. Vicksburg, 64 Miss. 777; Birge v. Gardiner, 19 Conn. 507, 50 Am. Dec. 261; Daley v. Norwich, 81 Ky. 638, 50 Am. Rep. 193; Hydraulic Works Co. v. Orr, 83 Pa. 332; Whirley v. Whiteman, 1 Head, 610."

The Supreme Court of South Carolina in Franks v. Southern Cotton Oil Co. 58 S. W. 960; 12 L. R. A., N. S. 468, held the defendant to be liable for the death of a child who went to its reservoir which defendant maintained in an open field in an unprotected condition where children were accustomed to resort and play. In reaching its conclusion the opinion of Mr. Chief Justice Cooley in Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, was quoted from as follows:

"Children, wherever they go, must be expected to act upon childish impulses; and others, who are chargeable with a duty of care and caution towards them, must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they, in their immature judgment, might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken. Or, as was tersely and pithily expressed in the Minnesota case (Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393): What an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years* * * *If an owner sees fit to keep on his premises something that is an attraction and allurement to the natural instincts of childhood, the law, it is well settled, imposes upon him the corresponding duty to take reasonable precautions to prevent the intrusion of children, or to protect from personal injury such as may be attracted thereby."

An examination of the authorities discloses that in jurisdictions where the turntable doctrine has been extended to embrace other attractive nuisances a variety of instrumentalities has been embraced. It

is not our contention that every unguarded pond, reservoir or other water course is or may become an attractive instrumentality alluring to children, but it is our contention that an artificial pond, reservoir or dam may become so, and in the instant case actually did become such. In humid regions where there is an abundance of moisture and consequently innumerable lakes, ponds, streams and water courses, a dam such as the one described in this case may not be attractive to children at all, furthermore, in such places, children of tender years presumably are early in life educated to the dangers attendant upon going in swimming; on the other hand, in arid regions of high altitude where moisture is scarce and natural lakes, ponds, streams and water courses are a rarity, the creation of an artificial pond such as that created and maintained by the defendant in this case is, and of necessity must be, a novelty and its very presence an enticing and alluring attraction to the youths of the community in which it is situated, and in the instant case did actually become so. The defendant having had actual notice of this condition and knowing the pond was habitually frequented by boys of immature years for swimming purposes owed more than a passive duty to them, such as the posting of signs and placards. In view of the fact that the premises were in charge of a watchman and pumpman the defendant owed to these youngsters the active duty to prohibit the use of the pond for the pur-

poses which resulted in the death of plaintiff's intestate.

It is true that some courts deny the right of recovery in actions of this kind unless the injury for which damages is sought was wantonly inflicted, or was due to recklessly careless conduct on the defendant's part, but of these cases Thompson in his work on Negligence says:

"This cruel and wicked doctrine, unworthy of a civilized jurisprudence, puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed, his inability to be a trespasser in sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult, and exonerates the person or corporation upon whose property he is a trespasser from any measure of duty which they would not owe under the same circumstances towards an adult." (1 Thomp. Neg. 2d ed. s 1026)

In conclusion, we respectfully submit the judgment of the trial court should be reversed and the cause remanded for a new trial.

Respectfully Submitted,

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